

NO. 83-5785

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

Supreme Court, U.S.  
FILED

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HERNANDO WILLIAMS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF ILLINOIS

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE  
PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the use of peremptory challenges by the prosecution should be reviewed in a case in which the prosecution's use of its peremptory challenges was clearly justified by any standard.

2. Whether the dismissal of a single prospective juror should be reviewed where the record of the interrogation of that juror is incomplete and the defense gave no legal grounds for objecting to the dismissal.

3. Whether the prosecution may be given discretion as to whether to seek a death sentence, and whether a comparative review of death sentences is required.

4. Whether the sentencing jury was entitled to consider the fact that petitioner killed his victim in order to prevent her from reporting his crime to the police and from testifying against him in court.

5. Whether petitioner's plea of guilty was lawfully accepted when he was informed at least five times that he could be sentenced to death on his plea.

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## OPINION BELOW

The opinion of the Illinois Supreme Court in this matter is reported as People v. Williams, 97 Ill. 2d 252, 454 N.E.2d 220 (1983). The Illinois Supreme Court denied petitioner's request for a rehearing on September 30, 1983.

## JURISDICTION OF THIS COURT

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. sec. 1257(3). However, as stated below, petitioner has not set forth sufficient reasons for this Court to grant certiorari in this matter.

## CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution upon which petitioner relies are given on pages 2 and 3 of his petition.

## STATEMENT OF THE CASE

Petitioner pled guilty to a particularly bizarre kidnapping, rape, armed robbery and murder. It is necessary to give the facts of the case as they are relevant to the issues raised in Sections III, IV, and V of his petition (prosecutorial discretion, proportionality, and definition of an aggravating factor).

On Thursday March 30, 1978 Linda Goldstone was on her way to Northwestern Memorial Hospital in Chicago to teach a class in natural childbirth. But as she parked her car petitioner approached and robbed Mrs. Goldstone of her money at gunpoint. Then petitioner made her partially disrobe and forced her into his own automobile. Petitioner was to hold Mrs. Goldstone captive over the following three days. For most of that period she was bound, gagged and confined in the trunk of petitioner's car.

On the first night that he held Mrs. Goldstone captive, petitioner gave his sister a ride home from work. Mrs. Goldstone was locked in the trunk of petitioner's car at that time. After he dropped off his sister, petitioner drove to the Dunes Motel on the south side of Chicago and rented a room. Then he forced Mrs. Goldstone into the room and raped her.

After the rape at the Dunes Motel petitioner drove to a closed gas station which had a pay telephone. There he ordered Mrs. Goldstone to call home and warn her husband not to call the police. Mrs. Goldstone called home twice, and during the second call spoke to her husband. He heard her say that she was all right and would be home in a little while. In the background he heard petitioner say, "Shut up bitch. Tell him you'll be home in about an hour."

After the second call Mrs. Goldstone broke and ran, trying to escape. Petitioner ran after her and caught her. Mrs. Goldstone then and at other times tried to persuade petitioner to release her, but he refused.

Evidence indicated that while petitioner held Mrs. Goldstone captive he inflicted one or more severe beatings on her. Witnesses who saw her later realized immediately that she had been beaten up. The Cook County Medical Examiner testified that Mrs. Goldstone had abrasions and contusions at numerous points on her body, particularly the face and pelvic regions.

On Friday March 31 (the second day Mrs. Goldstone was held captive) petitioner drove home and changed clothes. Then, with Mrs. Goldstone still in the trunk, he drove to the Maybrook Courthouse just west of Chicago. Peti-

tioner had to make a court appearance there in a case in which he was charged with the rape of a woman called Aline Krone.

Petitioner parked his car in the courthouse parking lot, and talked to Mrs. Goldstone through the lid of the trunk for a while. Then he went into the courtroom and met the law clerk who appeared on behalf of petitioner's attorney. Petitioner's case was continued.

Later, after his arrest in this matter, petitioner was convicted of the rape, aggravated kidnapping and armed robbery of Aline Krone. That conviction was affirmed on appeal.

After his court appearance petitioner drove to the south side of Chicago to visit some friends. But while petitioner was in the apartment of his friends, Linda Goldstone called for help through the lid of the trunk to people on the street. A woman passing heard Linda Goldstone say, "Help, please, help me somebody. I am in the trunk of a blue car," and saw Mrs. Goldstone stick a tire iron past the edge of the lid. But petitioner looked out the window of the apartment, saw the people gathered around his car, and went down and drove off. The police had been called, but they arrived about ten minutes too late.

Evidence indicated that Linda Goldstone had made strenuous efforts to get out of the trunk. There were striations inside the trunk, the lock was damaged, and paint was discovered beneath Mrs. Goldstone's fingernails.

On Saturday afternoon, after visiting a bar with some friends, petitioner checked into the Seville Motel. He remained there about two and a half hours and during that period he raped Linda Goldstone again.

After forcing Linda Goldstone back into the trunk, petitioner gave his niece a ride to his sister's home. Then petitioner spent the night with some friends, visiting two taverns, a hamburger stand, and the home of one of those friends.

By this time it was the morning of Saturday, April 1. Petitioner drove to a residential neighborhood on the far south side of Chicago and let Linda Goldstone out of the trunk. He gave her \$1.25 and told her to get on a bus and go straight home. He warned her not to call the police.

Petitioner then drove off. As soon as he was out of sight Linda Goldstone ran to a house and called for help. Chester Bukowiecz, who lived there, told Mrs. Goldstone he would call the police, but he refused to let her in. Mr. Bukowiecz did call the police, but when he returned to look at his porch Linda Goldstone was gone.

Petitioner had driven around the block in order to check on what Linda Goldstone was doing. When he saw her on the porch, he "... realized there was no way that she was not going to go to the police." Petitioner went up to the house and said, "Bitch, come down off that porch." He then forced Linda Goldstone at gunpoint to go to an abandoned garage around the corner.

Linda Goldstone pleaded with petitioner not to kill her. But petitioner shot her through the chest. After Mrs. Goldstone fell to the ground petitioner put his pistol to her head and fired a bullet through her brain.

The police, who had been called by Mr. Bukowiecz, arrived about five minutes later, but by then petitioner had escaped. However, petitioner was arrested at his home that afternoon. He was charged with murder, armed robbery, aggravated kidnapping and rape, and eventually pled guilty to those offenses. He was sentenced to death after a hearing before a jury.

1.

EVEN IF THIS COURT WERE INCLINED TO RECONSIDER ITS DECISION IN SWAIN V. ALABAMA, THIS WOULD NOT BE A PROPER CASE IN WHICH TO DO SO, SINCE THE REASONS FOR EACH OF THE PROSECUTION'S PEREMPTORY CHALLENGES ARE JUSTIFIABLE AND ARE READILY APPARENT FROM THE RECORD.

In the Swain decision this Court held that the use of peremptory challenges by the prosecution in an individual case was not subject to review. Swain v. Alabama, 380 U.S. 202 (1965). This Court has consistently refused to reconsider Swain, and in fact has repeated the holding in Swain in many subsequent decisions. Even if this Court were inclined to reconsider Swain, this would not be an appropriate case in which to do so, since the record shows that each of the peremptory challenges used by the prosecution against black prospective jurors was justified by reasons other than race.

Petitioner argues that prosecutors in Cook County use peremptory challenges to discriminate against black prospective jurors both in this case and in other cases. That contention should be rejected for the following reasons:

1. Under Swain and subsequent decisions the use of peremptory challenges in a single case is not subject to review.

2. Review of the use of peremptory challenges in a single case would lead to a vast amount of litigation, but would actually obstruct the choosing of fair and impartial juries.

3. Each of the peremptory challenges used by the prosecution in this case against black prospective jurors was justified by reasons other than race.

4. Petitioner has failed to prove systematic discrimination against black prospective jurors in Illinois, and in fact the evidence he cites proves nothing at all.

SWAIN IS STILL THE LAW.

In Swain this Court held that it would not review the use of peremptory challenges by a state prosecutor in a single case, even if all blacks had been removed from a jury. Swain v. Alabama, *supra*, 380 U.S. 202 (1965). This Court stated that only systematic discrimination in case after case would lead to federal review. Therefore petitioner is not entitled to have this Court review the use of peremptory challenges in his case.

Since 1965 this Court has repeatedly cited Swain as a binding authority. Regents v. Bakke, 438 U.S. 265, 319 Fn. 53 (1978); Apodaca v. Oregon, 406 U.S. 404, 413 (1972); Carter v. Jury Commission, 396 U.S. 320, 323 fn. 2 (1970). In Apodaca, which involved the application of the Sixth Amendment to state court proceedings, this Court restated the principle of Swain. 406 U.S. at 413. And in a footnote to the Bakke opinion this Court stated that a prosecutor may take ethnic background into account in picking a jury, and it is assumed that in doing so he has a lawful and legitimate purpose. 438 U.S. at 319 fn. 53.

The most significant restatement of the principle of Swain was in Taylor v. Louisiana, 419 U.S. 522 (1975), a leading Sixth Amendment case. In Taylor this Court held that systematic exclusion of women from the panels from which juries are chosen is unconstitutional, but made it clear that this principle did not apply to the selection of any particular jury. This Court said:

It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition. (419 U.S. at 538) (emphasis added).

Similar language may be found in City of Mobile v. Bolden, 446 U.S. 55, 77 fn. 24 (1980).

Thus, this Court has held that under the Sixth Amendment the use of peremptory challenges in an individual case is not subject to review. As petitioner notes, this Court has refused to reexamine this question. McCray v. New York, *cert. denied*, at 103 S.Ct. 2438 (1983); Davis v. Illinois (No. 83-

The Illinois Supreme Court has followed this Court's rule on peremptory challenges both in this matter and in People v. Payne, \_\_\_ Ill. 2d \_\_\_, \_\_\_ N.E.2d \_\_\_ (No. 56907, December 1, 1983).

B.

THIS COURT SHOULD NOT RECONSIDER ITS DECISION IN SWAIN, AS A CHANGE IN THAT RULE WOULD OBSTRUCT RATHER THAN PROMOTE THE CHOOSING OF FAIR AND IMPARTIAL JURIES.

This Court should not reconsider the rule it has followed in Swain and many subsequent decisions. The courts in most states have relied on those holdings in formulating their rules of criminal procedure. Furthermore, any change in Swain would make jury selection in criminal cases much more complicated, but would, if anything, make it more difficult to choose fair and impartial juries.

The holding in Swain is firmly rooted in the realities of trial practice. Nothing is more difficult to explain than why a trial lawyer has exercised a peremptory challenge in an individual case. As this Court noted in Swain, peremptory challenges are frequently exercised because of things which cannot be of record, such as hunches, body language or tone of voice. 380 U.S. at 220-221. Picking a jury is an art, not a science, and often the reasons for exercising a peremptory challenge will not be fully known, even to the attorney who has exercised it. Nothing would be more difficult on which to conduct a hearing than the question of why a trial lawyer has challenged particular jurors in an individual case.

In fact if petitioner's argument on this issue were accepted, the result could greatly increase the complexity of the jury selection process but the juries actually chosen would be less fair and impartial than those selected now. Every time a jury is selected, some groups will have no representation on it. As Justice William O. Douglas once said, ". . . in our pluralistic society, a group of 12 men and women could not possibly represent all of the ethnic, racial and economic groups which compose our diverse culture." Donaldson v. California, 404 U.S. 968, 972 (1971) (Douglas, J., dissenting from denial of certiorari). Therefore, in every jury trial in a criminal case a defendant would be able to demand a hearing on the grounds that some racial, ethnic, sexual, occupational, or residential group had been excluded from the jury. Once the

demand was made, the prosecution would then have to explain their use of peremptory challenges, thus in effect converting them into challenges for cause.

The peremptory challenge has been one of the principal instruments used by both the prosecution and the defense to remove actually biased individuals from juries. Petitioner would greatly limit or abolish the use of peremptory challenges by the prosecution. The result might also be to limit the use of peremptory challenges by defendants, as well. As courts in California and Massachusetts have recognized, once the use of peremptory challenges by the prosecution is limited, fair trial practice would require what similar limitations be imposed on the defense. Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979); People v. Wheeler, 583 P.2d 748 (Cal. 1978). Depriving both the prosecution and the defense of true peremptory challenges is hardly the way to ensure the selection of fair and impartial juries.

A remedy already exists for systematic discrimination against black prospective jurors during jury selection in criminal cases. As the Illinois Supreme Court stated in this matter, if a defendant can prove systematic discrimination in case after case, then that defendant would be entitled to a remedy. Defendants have attempted to prove systematic discrimination and have obtained a remedy in reported cases. State v. Washington, 375 So. 2d 1162 (La. 1979); State v. Brown, 371 So. 2d 751 (La. 1979); United States v. Robinson, 421 F.Supp. 467 (D.C. Conn. 1976), reversed, 549 F.2d 240 (1st Cir. 1977) (where statistical data over a period of time was offered but ultimately held insufficient to prove systematic discrimination).

Petitioner claims that few defendants would have the time or money necessary to attempt to prove systematic discrimination. Since petitioner never even attempted to prove systematic discrimination in the state courts, he should not be heard to claim that proof of systematic discrimination would be difficult. After all there are many reported decisions in which elaborate statistical data was presented on the composition of jury panels. These decisions include Donaldson v. California, 404 U.S. 968 (1971); United States ex rel. Barksdale v. Blackburn, 639 F.2d 1115 (5th Cir. 1981); Ross v. Wyrick, 581 F.2d 172 (8th Cir. 1978); and Dixon v. Hopper, 407 F.Supp. 58 (M.D. Ga. 1976). Similar data could be compiled on the racial composition of juries, but this has not been done in the case at bar.

In conclusion, unless there is proof of systematic discrimination the parties in a criminal case should be allowed to use their peremptory challenges as they see fit. Any other rule would limit or abolish the peremptory chal-

lenge, which has been a principle instrument used by both prosecution and defense to assure selection of fair and impartial juries.

C.

THE RECORD PROVES THAT THE USE OF PEREMPTORY CHALLENGES BY THE PROSECUTION IN THIS CASE WAS ENTIRELY JUSTIFIABLE, AND WAS NOT BASED ON RACE.

Even if this Court were inclined to reconsider its decision in Swain, this would be the wrong case in which to do so. It is the position of respondent that the use of peremptory challenges by the prosecution in a single case is not subject to review. But if the eight peremptory challenges used by the prosecution against black prospective jurors in this case were to be reviewed, that review would show that each challenge was justified by reasons other than race. Any trial lawyer would understand why those eight prospective jurors were excused.

Prospective juror Theresa Powell was an administrator for the University of Illinois. (T.R. 835) Prosecutors tend to be suspicious of academic intellectuals, and vice versa. She had a son the same age as petitioner. (T.R. 837) Furthermore, she stated forthrightly that ". . . I am opposed to capital punishment and I feel if I am on that jury, I would certainly argue for his life, yes." (T.R. 884)

Regina McBey was questioned as follows (T.R. 1768):

Q: . . . can you be a person that could sign your name to a verdict mandating the death of an individual, could you do that?

(Objection overruled)

THE JUROR: A: No.

In addition, Mrs. McBey was an active member of the Baptist Church. (T.R. 1630) The first defense witness was petitioner's father, Rev. David Williams, who in addition to owning a manufacturing company was also an ordained Baptist minister. Most of the defense witnesses were active church members. Even petitioner had once been assistant director of the Young Adults Choir of St. Mary's Missionary Baptist Church. (T.R. 4603-4608) The prosecutors had every reason to believe that an active Baptist would be prejudiced in favor of the defense.

Leonora Simmons was also active in a Baptist church. (T.R. 702) She stated that she was very nervous, had high blood pressure, and did not want to be on the jury. (T.R. 701, 715) She also had doubts about the death penalty (T.R. 705, 709-710):

A: Well, I just feel the Bible says I should not kill, but by me saying that, that's still not going to stop the death penalty, you know. So, that's how.

Q: So, your position or your feeling or your religious scruples derive from the Bible, is that correct?

A: Right.

Judith Timmons was also a practicing Baptist. (T.R. 1921) In addition, she repeatedly expressed the view that if petitioner had committed the crimes he was charged with then he must be a sick man. (T.R. 1950, 1953, 2010) She said ". . . a person to do something like that had to be sick or crazy. . . ." (T.R. 1953) Thus she had already formed an opinion that one of the statutory mitigating factors existed. Ill. Rev. Stat., Ch. 38, sec. 9-1(c)(2).

Brenda Jackson had lived for nine years close to the location where Linda Goldstone was shot to death. (T.R. 1503) No lawyer wants a person on the jury who has private knowledge about the case. In addition, she expressed doubts about her ability to be fair to both sides. (T.R. 1515)

Fannie Mae Green stated that she was nervous about being called for jury service and did not want to serve on the jury. (T.R. 1517, 1534) A juror who did not want to serve would be likely to be hostile to the prosecution, since most of the hearing would be taken up by presentation of prosecution witnesses. Also, a nervous juror might vote against the death penalty for fear of retaliation. This was particularly true since the prosecution was intending to present evidence that petitioner, while in jail, was active in the Disciples street gang. (T.R. 5121-5123, 5127)

Lillian Wallace had an adolescent son, but no daughters. (T.R. 1932) Therefore the assistant state's attorneys could have felt that she was the wrong person to ask to approve a death sentence for a young man.

Sheryl Williams apparently was a young, unmarried woman. (T.R. 278) The record indicates that petitioner, who had four children by four different mothers, was attractive to such women. (T.R. 4697) More important,

Miss Williams was a bank teller. (T.R. 277) Much of the evidence concerning the rape of Aline Krone would be about the operations of a bank, and in fact a teller was one of the prosecution's witnesses. (T.R. 4264-4270) The prosecution was going to ask the jury to believe that petitioner could have forced Aline Krone at gunpoint to cash a check at a bank and then turn the money over to him. Trial lawyers dislike prospective jurors who would carry special knowledge back to the jury room.

Finally, it should be noted that at one point the prosecutors argued vehemently that a black prospective juror should be seated, while the defense argued just as strenuously that he should be excused. (T.R. 1590-1599) That juror was Charles Lee who, although he was a security guard at Northwestern Memorial Hospital, had not been on duty when Linda Goldstone was kidnapped. Although Lee was eventually excused for cause, the record of his interrogation shows that the prosecution did not want an all-white jury.

Thus there was good reason for each of the eight peremptory challenges used by the prosecution to excuse black jurors. The prosecution had no obligation to explain their use of peremptory challenges, but they could have done so.

D.

PETITIONER FAILED TO ALLEGE SYSTEM-  
ATIC DISCRIMINATION IN THE STATE COURTS  
AND HAS FAILED TO PROVE IT IN THIS COURT.

Petitioner alleges that prosecutors in Illinois systematically discriminate against black prospective jurors. But at no time in the trial court or in the Illinois Supreme Court did petitioner offer evidence of systematic discrimination. This failure to offer evidence waives the issue. Nor has petitioner offered any valid evidence of systematic discrimination to this Court. He has merely quoted subjective opinions from dissents or from decisions which have been overruled.

In the state trial court petitioner was represented by the Cook County Public Defender's Office. That office has a representative in every criminal courtroom in Cook County, so petitioner could easily have gathered data on how peremptory challenges are actually used by prosecutors in the Chicago area. Whatever may be the case with a typical criminal defendant, petitioner could easily have offered evidence of systematic discrimination if any such evidence had existed. But no evidence on how juries are selected in Cook County was ever presented to the trial court.

On appeal petitioner is represented by the Illinois State Appellate Defender with the assistance of the Illinois Coalition Against the Death Penalty. Both organizations have the resources to accumulate data on the use of peremptory challenges in Illinois, so it may be assumed that the citations in their petition are the strongest evidence of discrimination that could be offered. Nevertheless, the unsupported assertions in the petition for certiorari do not prove anything.

Under Illinois law the failure to raise an issue in the trial court waives it on appeal. People v. Pickett, 54 Ill. 2d 280, 296 N.E.2d 856 (1973). In addition, the failure to raise an issue in state court waives it on review in this Court. Michigan v. Tyler, 436 U.S. 499, 512 fn. 7 (1978); Henry v. Mississippi, 379 U.S. 443, 446 (1965). Because evidence of systematic discrimination was not offered to the Illinois courts, petitioner has no legal right to seek certiorari on that issue.

Nor has petitioner offered any valid evidence of systematic discrimination to this Court. First of all, petitioner relies on the subjective impressions expressed by Illinois Supreme Court Justice Seymour Simon in his dissent in People v. Gosberry, 449 N.E.2d 815 (1983). But Justice Simon's six colleagues obviously do not share his opinions, because in Gosberry they summarily reversed over his dissent. Since Justice Simon did not cite any facts to back his assertions in Gosberry, his minority conclusion is no proof of systematic discrimination.

Petitioner also cites a subjective conclusion from the Gillard decision to the effect that prosecutors in Chicago discriminate in the use of peremptory challenges. People v. Gillard, 112 Ill. App. 3d 799, 807, 445 N.E.2d 1293, 1299 (1st Dist. 1983). Petitioner fails to note, however, that the only authority cited for that proposition in the Gillard opinion was the statement of a columnist in the Chicago Sun Times. The opinion of a newspaper columnist is not proof of anything. In any event the decision of the Appellate Court in Gillard was summarily reversed on appeal, so it is hardly a compelling authority. People v. Gillard (Ill. Sup. Ct., No. 58145, October 4, 1983).

The conclusions of Cook County Circuit Court Judge Howard Miller were also subjective impressions without any data cited in support. Petitioner's reliance on opinions without any factual basis emphasizes his failure to prove systematic discriminations.

Finally, petitioner asserts that in 40 out of 61 juries in death penalty cases in Illinois there were no jurors from racial minorities. But that assertion

would have meaning only if it were accompanied by information concerning the number of minority prospective jurors in those cases and the number of minority jurors excused through peremptory challenges exercised by the prosecution. After all, some of those juries were chosen in downstate Illinois counties with virtually no black residents. Furthermore, petitioner never presented such evidence in the trial court or in his brief in the Illinois Supreme Court. Therefore, the prosecution and the Illinois courts have never been given a chance to test the accuracy of petitioner's assertions.

In conclusion, petitioner never attempted to prove systematic discrimination in the Illinois courts, although he had the ability to compile statistics on the use of peremptory challenges by the prosecution in Cook County. In this Court he relies on assertions and conclusions without factual support in his attempt to establish systematic discrimination. Since petitioner has failed to establish systematic discrimination in case after case, he has failed to meet the legal standard required for an attack on the prosecution's use of peremptory challenges. In any event, the record in this case shows that there were reasons other than race for each of the prosecution's challenges to black prospective jurors. Therefore the petition for a writ of certiorari ought to be denied.

PETITIONER HAS WAIVED THE ISSUE OF WHETHER PROSPECTIVE JUROR DOLORES HUDSON WAS PROPERLY EXCUSED, BECAUSE HE FAILED TO PROVIDE A COMPLETE RECORD OF HER INTERROGATION AND BECAUSE HE FAILED TO OBJECT ON WITHERSPOON GROUNDS TO THE ORDER EXCUSING HER.

Jury selection in this case lasted five weeks and about 130 prospective jurors were examined. Petitioner's argument, however, concerns only one of those prospective jurors. He contends that Dolores Hudson should not have been excused. But for the following reasons petitioner has no basis to challenge the order excusing Mrs. Hudson:

1. Petitioner has failed to preserve a complete record of her interrogation.

2. Petitioner failed to object to excusing her on any grounds other than that he had failed to complete his interrogation of her, so Witherspoon grounds were waived.

3. Even the partial record of the interrogation of Mrs. Hudson shows that she would refuse to sign a death sentence on religious grounds.

4. Even assuming that it was error to excuse Mrs. Hudson, it would be harmless beyond a reasonable doubt, since the prosecution still had three peremptory challenges left at the end of jury selection.

Excusing Dolores Hudson for cause could not have affected the outcome of the sentencing hearing, since the prosecution could have excused her anyway through use of a peremptory challenge. Under Illinois law the granting of a challenge for cause is considered harmless when the prosecution does not exhaust its peremptories. People v. Moore, 42 Ill. 2d 73, 246 N.E.2d 299 (1969), aff'd sub nom. Moore v. Illinois, 408 U.S. 786 (1972); People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968). This is a reasonable rule of law, consistent with the holding of this Court that even constitutional errors may be found to be harmless beyond a reasonable doubt. United States v. Hastings, 103 S.Ct. 1974 (1983). Petitioner relies on the Davis decision for the propos-

ition that seating a single juror in violation of Witherspoon is error, but the majority opinion in Davis failed to consider whether this error could be harmless when the prosecution had peremptory challenges remaining. Davis v. Georgia, 429 U.S. 122 (1976); Witherspoon v. Illinois, 391 U.S. 510 (1968). The record does not show that any error occurred when Mrs. Hudson was excused, but excusing her for cause was harmless beyond a reasonable doubt when the prosecution could have used any of its three remaining peremptories to remove her.

But in any event petitioner is barred from attacking the challenge for cause to Mrs. Hudson, since he has failed to provide a complete record of her interrogation. The record on appeal gives the interrogation of Mrs. Hudson by defense counsel, but the interrogation by the prosecution is completely missing. The record on appeal does establish, however, that there was interrogation of Mrs. Hudson when it is not reported in the transcript. The jury was selected in panels of four, as then required by statute. Ill. Rev. Stat. 1977, Ch. 38, sec. 115-4(f). Since a panel of four had been tendered to the defense, one of petitioner's attorneys was the first to question Mrs. Hudson. During that interrogation the prosecution made a challenge for cause on Witherspoon grounds, which was denied by the trial court. (T.R. 2406-2407) Shortly thereafter the defense attorney announced that he had no further questions of Mrs. Hudson. (T.R. 2410) The trial judge then told Mrs. Hudson to step down. Since the jurors were being interrogated individually in camera, this simply meant that Mrs. Hudson should step outside until the defense tendered a panel of four to the prosecution, and it was the prosecution's turn to interrogate her.

There was a recess, and then the very next thing reported concerning Mrs. Hudson is the trial court's announcement for the record that she had been excused for cause. Defense counsel objected solely on the grounds that he had not finished his interrogation of Mrs. Hudson. Clearly she had been interrogated in unreported proceedings by the prosecution, and that interrogation had caused both the trial court and the defense attorneys to change their position. The trial court, which had previously denied a challenge for cause, now granted one. Defense counsel, who had previously announced that he had no more questions of Mrs. Hudson, now objected on the grounds that he had not been allowed to interrogate her enough.

In Illinois it is the duty of an appellant to provide a complete record of jury selection, and error will not be assumed from a silent record. People v. Gaines, 88 Ill. 2d 342, 354, 430 N.E.2d 1046, 1054 (1981). This Court also

requires that an appellant assure that all alleged errors are reflected in the record on appeal. Ciucci v. Illinois, 356 U.S. 571 (1958). As a practical matter, this Court could not adequately review the proceedings concerning prospective juror Dolores Hudson without a complete record. Therefore the incomplete record is sufficient grounds to refuse a grant of certiorari on this issue.

In addition, as the Illinois Supreme Court noted, petitioner's attorney at trial never objected to excusing Mrs. Hudson on the grounds that the challenge for cause was improper under Witherspoon. The sole grounds given by defense counsel for his objection was that he had not been given an opportunity to question her enough. Under Illinois law it is the duty of a defense attorney in a criminal case to ". . . explicitly make known to the court the nature of his objection, and move the court for the particular relief desired." People v. Adams, 4 Ill. 2d 453, 458, 123 N.E.2d 327, 330 (1954). By objecting to the challenge for cause on specific grounds, and by failing to make a Witherspoon objection, petitioner waived this issue with respect to Mrs. Hudson.

"Failure to present a federal question in conformance with state procedure constitutes an adequate and independent grounds of decision barring review by this Court, so long as the State has a legitimate interest in enforcing its procedural rule." Michigan v. Tyler, 436 U.S. 499, 512 fn. 7 (1978). See also Engle v. Issac, 456 U.S. 107 (1982). Since petitioner failed to raise his constitutional issue in a manner consistent with a reasonable state procedural rule, he is barred from raising it in this Court.

Petitioner cites numerous cases in an attempt to establish that Witherspoon objections during jury selection may never be waived. Those cases do not establish such a rule. But in any event they may all be distinguished on the grounds that here the failure to object on a Witherspoon basis was not a mistake by defense counsel, but was a matter of trial strategy. The record of jury selection in this case demonstrates that the defense attorneys knew very well how to make a Witherspoon objection when they wanted to. Clearly the defense attorney did not know whether he wanted Dolores Hudson to be a juror in this case or not. Therefore, instead of objecting to excusing her on substantive grounds, he merely argued that he should be given a chance to ask her further questions. Since defense counsel was employing a reasonable strategy when he merely requested an opportunity to question Mrs. Hudson further, petitioner should be held to the results.

Finally, the record in this case indicates that Dolores Hudson was

properly excused under the rule of Witherspoon v. Illinois, 391 U.S. 510 (1968). The record of jury selection, incomplete as it is, nevertheless was sufficient to justify a conclusion by the trial judge that Mrs. Hudson could not follow the court's instructions and could not sign a death penalty verdict even when justified by the law and the evidence. The record reflects the following exchange (T.R. 2405):

THE COURT: You don't like the electric chair? Miss Hudson, do you feel that in certain cases -- or can you conceive of the situation where the death penalty would be an appropriate punishment?

MRS. HUDSON: I-I-I was always taught thou shall not kill, and I would feel, you know, I would sit there and -- no matter what this person done, you know, to me, and I will sit there and write down that the death penalty, and I don't believe in it, you know, killing anybody, and that would be a burden on me, that my vote was in there to do this action, and I don't believe in it, you know.

Mrs. Hudson's opinions were not expressed according to a precise legal formula. The opinions of lay people seldom are. But they were sufficient to justify a conclusion by the trial judge that Mrs. Hudson for religious reasons could not sign a death penalty verdict. A trial judge must be granted discretion in interpreting the unorganized and emotional statements of a lay person.

Later, when Mrs. Hudson tried to explain her response, she was immediately cut off by the defense attorney (T.R. 2407):

MRS. HUDSON: Well, just like I told you, I don't believe in the death chair, so --

DEFENSE COUNSEL: I have no further questions, Judge.

If Mrs. Hudson's responses were ambiguous, then it was because petitioner refused to let her explain her answers. But the trial judge, who saw and heard Mrs. Hudson, could well conclude that she could never sign a death penalty verdict in any circumstances.

In conclusion, petitioner was not prejudiced when Dolores Hudson was excused for cause, since the prosecution could have used one of its remaining peremptory challenges to excuse her. Petitioner has failed to include the

prosecution's interrogation of Mrs. Hudson in the record on appeal, so he is barred from asserting that she was improperly excused. Petitioner never objected on Witherspoon grounds to excusing Mrs. Hudson, so he has waived the issue under a valid Illinois procedural rule. And finally, even the incomplete record was sufficient to justify a conclusion by the trial judge that Mrs. Hudson would not vote to impose a death sentence under any circumstances.\*

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\* Petitioner asserts in a footnote that prospective jurors Jean Samp and Joan Carter were improperly excused for cause. But Mrs. Samp stated that she could not be an unbiased juror, and Mrs. Carter said that she would follow her inner feelings rather than the law. A bias on the part of a juror and a refusal to follow that law are appropriate grounds for a challenge for cause, quite apart from Witherspoon. Adams v. Texas, 448 U.S. 38, 44 (1980); Lockett v. Ohio, 438 U.S. 586, 596 (1978).

THE ILLINOIS DEATH PENALTY STATUTE  
IS CONSTITUTIONAL UNDER THE EIGHTH AND  
FOURTEENTH AMENDMENTS AS INTERPRETED  
BY THIS COURT.

A.

PROSECUTORIAL DISCRETION ON WHETHER  
TO SEEK A DEATH SENTENCE IS BOTH DESIR-  
ABLE AND UNAVOIDABLE.

In every American jurisdiction which has the death penalty certain executive officials must choose whether a death sentence may be imposed or carried out. A prosecutor may always block imposition of a death sentence by bringing a lesser charge or no charge at all. Even after a death sentence has been imposed, a governor (or the President of the United States in federal cases) may prevent it from being carried out by extending executive clemency. These grants of discretion are both desirable and unavoidable.

Such discretion is unavoidable because in our legal system the initiative in prosecuting a case always lies with the executive branch of government. A prosecutor may always block imposition of a death sentence by simply refusing to charge a death penalty offense. It is true that a death penalty statute might be devised under which a death penalty hearing followed automatically after a murder conviction. But even then a prosecutor could prevent imposition of a death sentence by simply refusing to present evidence of aggravating factors. Thus the Illinois death penalty statute, which gives prosecutors discretion on whether to seek a death sentence, simply recognizes a result that would be inevitable under any death penalty statute which could be drafted.

A grant of prosecutorial discretion is desirable because a death penalty statute would be intolerable if the executive branch of government was required to seek death sentences against its will and had no opportunity to exercise mercy. As this Court said in Gregg v. Georgia, 428 U.S. 153, 199 (1976):

First, petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons who he wishes to prosecute for a capital offense and to plea bargain with them.... Nothing in any of our

cases suggests that the decision to afford an individual defendant mercy violates the Constitution.

In a footnote in Gregg this Court suggested that outlawing prosecutorial discretion might be unconstitutional for the same reason that mandatory death sentences are unconstitutional. 428 U.S. at 199.

It must be emphasized that petitioner makes no claim that prosecutorial discretion was exercised in an arbitrary or discriminatory fashion in his particular case. Instead, he attacks the concept of prosecutorial discretion in general. Indeed the facts of this case suggest that prosecutors would have requested a death sentence for petitioner in Sangamon County or any other county in Illinois.

This Court has held that under the Constitution prosecutors have discretion to decide what charges will be brought against a defendant, even when the possible charges involve very different punishments. United States v. Goodwin, 457 U.S. 368 (1982); Bordenkircher v. Hayes, 434 U.S. 357 (1978). The exercise of prosecutorial discretion is perhaps even more necessary in potential death penalty cases than in other cases.

Petitioner also suggests that the Constitution requires that the death penalty must be sought on a uniform basis throughout Illinois, and that local prosecutors may make no allowances for local conditions. But it would be clearly unreasonable, in a state as diverse as Illinois, to require every community to deal with crime in the same manner. Illinois, after all, contains the City of Chicago, which has 600 to 1,000 murders a year, and also contains rural counties in which the time between murders may be measured in years or decades. The reason why the death penalty exists is to protect the public and to express the outrage of society at particularly horrible crimes. Gregg v. Georgia, *supra*, 428 U.S. 153 (1976). If the elected representative of a local community feels that a death sentence is unnecessary to accomplish those goals, then he should not be forced to request one. In the Pulley decision this Court held that the Constitution does not require statewide review of death sentences for proportionality. Pulley v. Harris (No. 82-1095, January 23, 1984). That decision implies that statewide uniformity in enforcement of a death penalty statute is not constitutionally required.

In conclusion, prosecutorial discretion in seeking death sentences is unavoidable under any death penalty statute that could be drafted. This Court has clearly held prosecutorial discretion to be a valid and constitutional part of this country's system of justice.

THE ILLINOIS DEATH PENALTY STATUTE COMPLIES WITH THIS COURT'S DECISIONS IN PROVIDING THAT, ONCE A DEFENDANT HAS BEEN PROVEN ELIGIBLE FOR THE DEATH PENALTY BEYOND A REASONABLE DOUBT, ALL AGGRAVATING AND MITIGATING FACTORS MAY BE CONSIDERED IN DETERMINING WHETHER A DEATH SENTENCE WILL ACTUALLY BE IMPOSED.

The Illinois death penalty statute provides that a judge or jury shall deliberate on a death sentence in two stages. First, the prosecution must establish eligibility by proving beyond a reasonable doubt that one of a limited and specific list of aggravating factors exists. Then, if the defendant has been proven eligible beyond a reasonable doubt, the judge or jury may consider all aggravating and mitigating factors in determining whether a death sentence will actually be imposed. Ill. Rev. Stat. 1977, Ch. 38, sec. 9-1.

This statutory plan is clearly constitutional according to the decisions of this Court. The requirement that eligibility be proven beyond a reasonable doubt under a limited list of aggravating factors is designed to assure that the jury's discretion is controlled by specific standards. Gregg v. Georgia, 428 U.S. 153 (1976). The requirement that all aggravating and mitigating factors may be considered once eligibility is proven is designed to assure that the individual characteristics of each defendant are examined. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

Petitioner contends that the Illinois statute is unconstitutional in that it allows evidence of all aggravating and mitigating factors at the second stage of the proceedings and in that it fails to set a burden of proof at the second stage. Those contentions have been rejected by this Court.

The Illinois statute is similar to the Florida statute upheld by this Court in Proffitt v. Florida, 428 U.S. 242 (1976). Both the Florida and the Illinois statutes were in turn based on the Model Penal Code. Neither statutes provides for a burden of proof when aggravating factors are weighed against mitigating factors by a judge or jury. In Proffitt this Court held that the Florida statute was sufficient to prevent arbitrary imposition of the death penalty.

The Illinois statute requires a specific finding that the existence of at least one statutory aggravating factor be proven beyond a reasonable doubt. But after the jury's discretion is thus limited, all relevant aggravating and

mitigating evidence may be considered. It is entirely appropriate that no death sentence may be imposed until after the jury has heard all relevant evidence. As this Court said in California v. Ramos, 103 S.Ct. 3446, 3456 (1983):

Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense the jury's choice between life and death must be individualized.

In fact this Court has struck down statutes which did not permit individual consideration of the characteristics of each defendant in a capital punishment case. Lockett v. Ohio, 438 U.S. 586 (1978).

Petitioner argues that some standard or burden of proof must be employed to direct the jury's consideration of aggravation and mitigation. This argument was rejected by this Court in Zant v. Stephens, 103 S.Ct. 2733 (1983). Petitioner attempts to distinguish Zant on the grounds that the Georgia statute provided for pretrial discovery of evidence to be used at a death penalty hearing. But petitioner has no standing to make that argument, since he also was given full discovery. The only significant aggravating evidence used by the prosecution concerned the murder of Linda Goldstone and the rape of Eileen Krone. Petitioner was given all relevant documents concerning both offenses.

In fact a burden of proof at the second stage of an Illinois death penalty hearing would make little or no sense. The function of the jury, when it weighs aggravating and mitigating evidence, is not to make a particular factual finding, but to weigh the importance of a large number of different facts. Just as there is no burden of proof at an ordinary sentencing hearing before a judge, there should be no burden of proof when a jury weighs the comparative importance of aggravating and mitigating factors. Every time a sentencing hearing occurs in an ordinary criminal case, facts are evaluated without a burden of proof on either party.

Petitioner argues that under the Illinois statute the jury might consider impermissible or irrelevant aggravating factors. But a judge has the power to control the evidence and argument heard by the jury, and will of course instruct the jury to confine its deliberations to the evidence introduced before it. By controlling evidence and argument the judge can assure that no

improper evidence is introduced or considered.

In any event, petitioner makes no claim that the prosecution in his case relied on any improper aggravating factors. The prosecution here relied on petitioner's crimes and his lack of remorse for those crimes.

In conclusion, the Illinois death penalty statute requires proof of a statutory aggravating factor beyond a reasonable doubt, but then permits consideration of all relevant aggravating and mitigating evidence. This is a reasonable and constitutional means of channeling the jury's discretion while permitting individual consideration of the character and history of each defendant.

C.

PETITIONER'S ARGUMENT CONCERNING  
PROPORTIONALITY WAS REJECTED BY THIS  
COURT IN PULLEY V. HARRIS.

Petitioner argues that the Illinois death penalty statute is unconstitutional in that it fails to provide for appellate review of death sentences for proportionality. Respondent asserts that the Illinois statute does permit such a review. But in any event petitioner's contention was rejected by this Court in Pulley v. Harris (No. 82-1095, January 23, 1984).

In addition, petitioner could not benefit from a proportionality review as his crimes are unique. So far as respondent is aware, there has never been another case in which murderer and rapist held his victim captive while making a court appearance on another rape case.

IV.

SINCE THE EVIDENCE SHOWED THAT PETITIONER KILLED LINDA GOLDSTONE WHILE THE POLICE WERE ON THEIR WAY TO THE SCENE, AND THAT SHE WAS KILLED SPECIFICALLY IN ORDER TO KEEP HER FROM TALKING TO THE POLICE, IT WAS PROVEN THAT PETITIONER KILLED A WITNESS ACCORDING TO A LIMITED DEFINITION OF THAT AGGRAVATING FACTOR.

Petitioner was found eligible for the death penalty under two of the aggravating factors listed in the Illinois statute. The first was that petitioner had killed Linda in the course of a rape, armed robbery and aggravated kidnapping, and the second was that petitioner killed Linda Goldstone because she was a witness against him. Ill. Rev. Stat. 1977, Ch. 38, secs. 9-1(b)(6), 9-1(b)(7). Under the Illinois statute either aggravating factor made petitioner eligible for the death penalty, although the jury could still refuse to impose a death sentence if there were sufficient mitigating factors. Petitioner pled guilty to murder, rape, armed robbery and aggravated kidnapping, so of course there is no doubt that he was eligible for the death penalty. But petitioner contends that the second aggravating factor (killing a witness) was so broadly defined that it would make any murder a potential capital offense.

Petitioner's contention is incorrect, and is shown to be incorrect simply by an examination of the facts of this case. The evidence shows that petitioner killed Linda Goldstone in order to obstruct an ongoing police investigation, since the police had been notified and were on their way to the scene when Mrs. Goldstone was murdered. And there is evidence from petitioner's own mouth that he killed Linda Goldstone specifically in order to keep her from talking to the police. Therefore petitioner killed a witness against him within the limited definition used in the Illinois statute. Ill. Rev. Stat. 1977, Ch. 38, sec. 9-1(b)(7). Petitioner's crimes were unique, and the aggravating factor of killing a witness, as defined by the Illinois Supreme Court, would exist in only a small number of murders.

The police were notified soon after Linda Goldstone was kidnapped, and they were searching for her throughout the three days she was held captive. At one point (when Mrs. Goldstone called for help from the trunk of the car to the people on the street) the police came within ten minutes of rescuing her. Therefore at the time Linda Goldston was murdered there was an ongoing police investigation into her kidnapping which was several days old.

On the morning of Saturday, April 1, petitioner released Linda Goldstone after warning her not to go to the police. But after petitioner drove off Mrs. Goldstone ran to the home of Chester Bukowicz and called for help. Bukowicz refused to let her in, but he went and called the police. He was actually on the telephone to the police when petitioner kidnapped Linda Goldstone again. The police dispatched a car which was on its way to the scene when Mrs. Goldstone was murdered.

Petitioner confessed at least twice that he kidnapped Linda Goldstone the second time in order to keep her from talking to the police. An investigator reported part of petitioner's oral statement as follows (T.R. 3674):

He said all right, that he would talk, that he didn't want to hurt Mrs. Goldstone, that he intended to leave her go, and that he in fact let her go on her promise that she would not go to the police. When he saw her go up to the door at 104th and Maryland, he realized there was no way that she wasn't going to go to the police.

Petitioner's later statement to a court reporter said much the same thing (T.R. 3761):

I saw her on somebody's porch and she was talking to somebody, you know, call the police, you know, this and that, whoever she was talking to.

There was also much other evidence that petitioner had repeatedly warned Linda Goldstone and her husband not to contact the police. Thus there was plenty of evidence to justify the jury's conclusion that Linda Goldstone was killed specifically to prevent her from talking to the police and becoming a witness against petitioner.

Petitioner's crimes were unusual, to say the least. Probably this Court will never see another case in which the victim of an armed robbery, aggravated kidnapping, and rape manages to contact the police before being murdered. The evidence simply does not support petitioner's contention that if he killed a witness, then every murderer kills a witness.

Here two facts were present which are not present in the vast majority of murders. First, there was an ongoing police investigation into petitioner's crimes against his victim at the time he murdered her. Second, there was overwhelming evidence that petitioner killed his victim specifically in order

to prevent her from reporting his crimes to the police. Clearly Illinois has a strong interest in preventing and punishing the killing of a witness. The Illinois Supreme Court has already held that an ordinary murder case does not involve the killing of a witness within the meaning of the death penalty statute. People v. Brownell, 79 Ill. 2d 508, 404 N.E.2d 161 (1980). It is only the special and unique facts of this case which made petitioner eligible for a death sentence for killing a witness.

In any event, the finding that petitioner was eligible for the death penalty for killing a witness could not have affected the outcome of the death penalty hearing. Petitioner was found to be eligible for the death penalty on the completely separate grounds that he had killed Linda Goldstone in the course of an aggravated kidnapping, armed robbery and rape. Indeed, given petitioner's plea of guilty in those crimes, there was never any doubt that he was eligible for the death penalty. A finding of an improper aggravating factor does not require that a death sentence be vacated, when it is clear that the defendant was eligible for a death sentence on other grounds and the improper finding could not have affected the result. Barclay v. Florida, 103 S.Ct. 3418 (1983).

In this case there were two hearings, although both involved the same jury. At the first hearing the jury found that petitioner was eligible for the death penalty. Then, at a second hearing, the jury found that there were no mitigating factors sufficient to preclude a death sentence, and so sentenced petitioner to death. Since the question of eligibility was carefully separated from the question of mitigation, the finding that petitioner killed a witness against him could not have affected the outcome of the second hearing. After all, at the second hearing the jury was entitled to consider the evidence that petitioner killed Linda Goldstone to keep her from talking to the police, whether that was a proper statutory aggravating factor or not. Since there was no doubt that petitioner was eligible for a death sentence, and since the mitigation hearing was separated from the eligibility hearing, the finding that petitioner killed a witness could not have affected the outcome of this case.

In conclusion, in this case the evidence established that petitioner killed Linda Goldstone in order to obstruct an ongoing police investigation and specifically in order to prevent his victim from reporting his crimes to the police. These factors, which are present in only a small number of murders, are a proper basis on which to impose the death penalty. In any event, the finding that petitioner killed a witness did not cause the imposition of the death

sentence, since petitioner was eligible for the death penalty on completely different grounds.

PETITIONER WAS FULLY AWARE THAT HE  
COULD BE SENTENCED TO DEATH ON HIS PLEA  
OF GUILTY.

Petitioner contends that he was not definitely informed before he pled guilty that the prosecution would seek a death sentence. For the following reasons this assertion is misleading and provides no basis for attacking the validity of the plea:

1. The issue is waived, because when petitioner pled guilty he did not demand that the prosecution tell him whether they would seek the death penalty.

2. Petitioner was repeatedly informed, both orally and in writing, that he could be sentenced to death on a plea of guilty.

3. Due process requires only that a defendant pleading guilty be informed of the maximum and minimum sentences he may receive on his plea, and there is no requirement that he be informed of the specific sentence that the prosecution may seek.

4. Any error was harmless, since the record establishes that petitioner knew that the prosecution would seek a death sentence after his plea.

First of all, this issue is waived because petitioner did not demand that the prosecution tell him whether they would seek a death sentence on a plea of guilty. Indeed, petitioner did not even give the prosecution a chance to make up their minds on that point. Petitioner did not give the prosecution any notice that he was going to change his plea. At the hearing at which petitioner announced his change of plea, the assistant state's attorneys expressed surprise and shock, and emphatically stated that no promises or representations had been made to petitioner. (T.R. 1-10) Petitioner did not request that any promises or representations be made. Nor did petitioner give the assistant state's attorneys time to consult with their supervisors, who alone had authority to approve a request for a death sentence. (T.R. 63) By failing to raise this

issue at the time he changed his plea, petitioner waived it for purposes of review. Moore v. Illinois, 408 U.S. 786, 799 (1972).

In any event the record shows that petitioner was repeatedly informed that he could be sentenced to death, and that he was aware of that fact. On the night of his arrest petitioner asked if he was going to be sentenced to death. (T.R. 3686) During pretrial discovery the prosecution tendered to the defense a document which stated the following (T.R. 6116):

From the outset, this case has been treated as a potential death penalty case by the Prosecution, by the Defense and by the Court. The People, in response to Discovery Motions filed by the Defense, have fully informed the Defendant of the nature of the case against him and will continue to do so.

Clearly the Defendant has been put on notice that this case fits the death penalty statute. Clearly this case fits Ch. 38, sec. 9-1(b)(6) and (7) I.R.S. (1977).

At the time petitioner pleaded guilty, the trial judge admonished him twice that he could be sentenced to death. One of those admonishments was: "If you are found guilty of murder, under the circumstances of which case the death penalty could be imposed." (T.R. 10) In addition, at two points during the change of plea an assistant state's attorney noted that petitioner was eligible for the death penalty. (T.R. 11-12, 63)

Thus petitioner was repeatedly informed that the maximum sentence that could be imposed on him was death. This was all that due process required. Petitioner does not cite any case which requires that the prosecution inform a defendant, before a plea of guilty is accepted, of the specific sentence that the prosecution will request.

Petitioner relies solely on Boykin v. Alabama, 395 U.S. 238 (1969). But that decision did not even require admonishments concerning maximum and minimum sentences. It only required that the record of a guilty plea show that it was voluntary, and that such federal constitutional rights such as the right to a jury trial were knowingly waived. Nothing in Boykin requires that the state notify a defendant before a plea of the specific sentence it will seek.

Shortly after Boykin this Court decided Brady v. United States, 397 U.S. 742 (1970), which is in point against petitioner on this issue. The defendant in Brady had pled guilty to avoid a death sentence, but the statute

which permitted a death sentence was later held unconstitutional. This Court held that even though the defendant had pled guilty under the mistaken impression that he could be sentenced to death after a trial, the plea was still valid and binding. By the same logic petitioner's plea was valid when he knew that it was very likely, but not certain, that the prosecution would seek a death sentence.

In fact it would impose an intolerable burden on trial courts if the prosecution had to announce before a plea the specific sentence it would seek after a plea. Many different sentences may be imposed only if the prosecution introduces certain evidence at the sentencing hearing. The sentence that the prosecution will seek will often depend on an investigation of the defendant's background. It would be irrational to require the prosecution to commit itself to seek a specific sentence before a plea and an investigation. In death penalty cases the only result would be that the prosecution would announce in almost every case that it would seek a death sentence.

Finally, the record in this case shows that in fact petitioner was aware that the prosecution would seek a death sentence after his plea. Petitioner's attorneys during the change of plea made it clear that their stipulation to the evidence would not apply at the death penalty hearing. (T.R. 61) Even more important is the fact that at the conclusion of the change of plea hearing petitioner's attorneys filed a discovery motion seeking disclosure of the grounds on which the prosecution would seek a death sentence. (T.R. 64, 6216) Petitioner's attorneys would not have prepared such a motion in advance unless they knew that the prosecution would ask for the death penalty. Since petitioner knew that the death penalty would be requested, the failure to specifically notify him of that fact was harmless. United States v. Hastings, 103 S.Ct. 1974 (1983).

In conclusion, there is no authority for the proposition that a defendant must be informed before a plea of guilty of the specific sentence that the prosecution will seek. Furthermore, petitioner has waived this issue by failing to request such notice before his plea of guilty. In fact the record shows that petitioner was fully aware that a death sentence would be sought in this case.

## CONCLUSION

Respondent, the People of the State of Illinois, respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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